

Before the
DOCKET FILE COPY ORIGINAL Federal Communications Commission
Washington, D.C. 20554

Aug 12 8 29 AM '03
DISPATCH

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of)	RM-10586
Fixed and Mobile Broadband Access, Educational)	
and Other Advanced Services in the 2150-2162)	
and 2500-2690 MHz Bands)	
)	
Part 1 of the Commission's Rules - Further)	WT Docket No. <u>03-67</u>
Competitive Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service and the)	
Instructional Television Fixed Service)	
Amendment of Parts 21 and 74 to Engage in Fixed)	
Two-Way Transmissions)	
)	
Amendment of Parts 21 and 74)	WT Docket No. 02-68
of the Commission's Rules With Regard to)	RM-9718
Licensing in the Multipoint)	
Distribution Service and in the)	
Instructional Television Fixed Service for the)	
Gulf of Mexico)	

SECOND MEMORANDUM OPINION AND ORDER

Adopted: July 31, 2003

Released: August 8, 2003

By the Commission:

I. INTRODUCTION

1. In this *Second Memorandum Opinion and Order*, we address petitions for reconsideration filed by the Wireless Communications Association International, Inc. (WCA)¹ and Plateau Telecommunications, Inc. (Plateau).² WCA and Plateau seek reconsideration of the *Memorandum Opinion and Order (MO&O)* portion of the *Notice of Proposed Rulemaking and Memorandum Opinion and Order*³ adopted in this proceeding. Specifically, WCA and Plateau seek reconsideration of our

¹ Petition for Reconsideration of Wireless Communications Association, International, Inc (filed Apr 7, 2003) (WCA Petition).

² Petition for Reconsideration of Plateau Communications, Inc (filed Apr 8, 2003) (Plateau Petition).

³ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures, Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions, Amendment of Parts 21 and 74 of the Commission's Rules With (continued...)

decision to suspend the acceptance of (freeze) applications for new Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS) stations, as well as major modifications or changes to stations in those services. For the reasons stated below, we will modify the freeze by allowing the filing of applications for new licenses and major modifications of MDS stations adopted in the *MO&O*. With respect to ITFS stations, we will accept major change applications, subject to the existing requirement that a licensee may not modify its protected service area (PSA). As modified, the freeze on MDS and ITFS applications will revert to the *status quo ante* that applied before the *MO&O* was adopted. However, we caution applicants that we will require all facilities to conform to any new rules that we subsequently adopt for this band. We will be especially disinclined to grandfather any nonconforming facilities that are built during the pendency of this rulemaking. We believe this action furthers the public interest by allowing licensees who wish to deploy wireless broadband systems under the current MDS and ITFS rules to file the necessary applications and proceed with such deployment without limiting our ability to develop new service rules for these services

II. BACKGROUND

A. The NPRM and MO&O

2 On April 2, 2003, we adopted the *NPRM and MO&O* in this proceeding. We initiated this proceeding to begin a comprehensive examination of our rules and policies governing the licensing of the services in the 2500-2690 MHz band.⁴ We sought to promote competition, innovation and investment in wireless broadband services, and to promote educational services.⁵ Additionally, we sought to foster the development of innovative service offerings to consumers as well as educational, medical and other institutions, simplify the licensing process and delete obsolete and unnecessary regulatory burdens.⁶

3. In the *MO&O*, we determined that applications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control would not be accepted until further notice.⁷ We took that action to permit the orderly and effective resolution of issues in this proceeding and explained that, absent such action, applications for new licenses, amendments, and modifications might limit the effectiveness of the decisions ultimately made in the context of this proceeding.⁸

B. The WCA and Plateau Petitions for Reconsideration

4. On April 7, 2003 and April 8, 2003, respectively, WCA and Plateau filed petitions for reconsideration of the *MO&O* to the extent that the *MO&O* instituted a freeze on the filing of new and
(Continued from previous page) _____

Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003). When referring to the *Notice of Proposed Rulemaking* portion of the document, we will refer to the document as the *NPRM*. When referring to the *Memorandum Opinion and Order* portion of the document, we will refer to the document as the *MO&O*.

⁴ *NPRM*, 18 FCC Rcd at 6724 ¶ 1

⁵ *Id*

⁶ *Id*

⁷ *Id*, 18 FCC Rcd at 6825 ¶ 260.

⁸ *See id*, 18 FCC Rcd at 6813 ¶ 226.

major modification MDS (and, in WCA's case, major change ITFS) applications. WCA states that it has no objection to continuing the prohibition on applications proposing new ITFS facilities in unassigned ITFS spectrum.⁹ WCA argues that, in all other respects, the benefits of a freeze are minimal because licensees have PSAs within which they have the exclusive right to construct new facilities.¹⁰ WCA contends that, despite the well-documented difficulties associated with licensing MDS/ITFS facilities that can be used to deploy wireless broadband services, a small but significant number of system operators have chosen nonetheless to pursue deployment strategies under the current licensing process rather than await new rules.¹¹ In this connection, WCA states that next-generation MDS/ITFS non-line-of-sight technologies are proving themselves in trials and initial deployments and that several system operators were well on their way toward deploying new wireless broadband systems prior to the release of the *MO&O*.¹² In addition, it says, operators of existing wireless broadband systems will be unable to add cells or to sectorize antenna systems at existing cells in order to expand capacity to meet existing demand.¹³ WCA says it is aware of approximately thirty wireless broadband systems in eighty markets that were under development for deployment in the next twelve months but that would be unable to launch as a result of the freeze adopted in the *MO&O*.¹⁴ Similarly, Plateau states that the freeze has prevented it from filing applications for facilities that would allow it to provide broadband Internet services in rural eastern New Mexico.¹⁵ Plateau also argues that a freeze is inconsistent with its expectations and legal rights when it purchased MDS Basic Trading Area (BTA) licenses at auctions and from other licensees.¹⁶

5 All of the parties commenting on the reconsideration petitions support WCA's and Plateau's contentions.¹⁷ Several commenters assert that the freeze has interfered with their plans to deploy wireless broadband systems under our current rules.¹⁸ Equipment manufacturers also argue that the freeze is having a negative impact upon technology development of wireless broadband systems.¹⁹

⁹ WCA Petition at 4

¹⁰ *Id.* at 4-5

¹¹ *Id.* at 6

¹² *Id.* at 7.

¹³ *Id.* at 8.

¹⁴ See Ex Parte Presentation from Paul J. Sindebrand, Esq. to Secretary, Federal Communications Commission (filed Apr. 23, 2003) at 2

¹⁵ Plateau Petition at 2.

¹⁶ *Id.* at 2-3

¹⁷ A list of commenters is provided as Attachment A to this *Second Memorandum Opinion and Order*.

¹⁸ See, e.g., Zephyr Comments at 1-2 (describing Zephyr's interest in the Chico, California market), WinBeam Comments at 1 (Altoona, Pennsylvania), VCI Comments at 2, Sioux Valley Wireless Comments at 1 (Sioux Falls, South Dakota), Wireless World Comments (Virgin Islands), Letters from Eliot J. Greenwald, Counsel for TNT Technologies LLC, dba Clearwave, to Marlene H. Dortch (notices of July 10-11, 2003, ex parte meetings with Barry Ohlson, Jennifer Manner, Bryan Tramont, Paul Margie, Samuel Feder, et al.).

¹⁹ See IP Wireless Ex Parte Presentations, ComSpec Comments.

III. DISCUSSION

6. In the *MO&O*, we imposed a freeze on applications for new MDS or ITFS licenses, major modifications of MDS stations, and major changes to ITFS stations other than license assignments or transfers of control in an effort to preserve the potential of realizing the goals and policies underlying this proceeding.²⁰ We did so in the context of a comprehensive rule making designed to facilitate the provision of two-way fixed and mobile services, including high-speed Internet access, on the channels between 2500 and 2690 MHz that are designated for MDS and ITFS.²¹ Our purpose was to prevent further construction that might be inconsistent with rules and policies that we may later adopt for the band. We were concerned that unconstrained investment in interim technology and systems could generate resistance to the adoption of advanced-system rules, if after subsequent analysis we were to conclude that the interim technologies involved are not consistent with necessary rule changes.

7. At the time we adopted the *NPRM and MO&O*, the existing record indicated that any deployment of advanced two-way systems in the 2500-2690 MHz band would be minimal until we completed our comprehensive review of our rules. For example, in an October 2002 proposal filed jointly with organizations representing most ITFS operators, WCA argued that it is difficult or impossible for MDS and ITFS operators to deploy two-way or mobile systems under existing rules.²² The Coalition Proposal states that “current . . . rules effectively prevent system operators from securing licenses for the facilities needed to provide the ubiquitous coverage required for a viable commercial service to portable, nomadic and mobile laptops, PDAs and other non-stationary devices.”²³ It adds, “If not substantially modified, the current licensing regime of Parts 21 and 74 will effectively preclude commercial operators and educators from taking advantage of the substantial opportunities that next generation MDS/ITFS technology offers for the provision of commercial services and educational applications.”²⁴

8. The record now before us, however, indicates that notwithstanding the difficulties they face, many licensees have developed plans to deploy high-speed wireless broadband systems in the near future under our existing rules. If, as WCA asserts, approximately thirty wireless broadband operators plan to deploy systems in approximately eighty markets in the next twelve months, we are concerned that the freeze could have a major negative impact on those plans. It appears that several MDS/ITFS operators were well underway with serious efforts to deploy two-way, if not fully mobile, Internet access services when the *MO&O* was adopted. Such systems present a significant opportunity to provide alternatives for the provision of broadband services to consumers in urban, suburban and rural areas and to improve opportunities for distance learning and telemedicine services. It also appears that our freeze action may have disrupted those plans and brought those efforts to a halt. To the extent that MDS and ITFS operators

²⁰ *MO&O*, 18 FCC Red at 6825 ¶ 260

²¹ Application freezes are procedural in nature, and the Administrative Procedure Act does not require agencies to invite public comment before adopting them. See *Buckeye Cablevision v. United States*, 438 F.2d 948, 952-53 (6th Cir. 1971); *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637-38 (D.C. Cir. 1964); *Kessler v. FCC*, 326 F.2d 673, 680-82 (D.C. Cir. 1963).

²² See “A Proposal for Revising the MDS and ITFS Regulatory Regime,” submitted by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network, RM-10586 (filed Oct. 7, 2002) (“Coalition Proposal”).

²³ *Id.* at 8.

²⁴ *Id.* at 10

have expended time, effort, and money before the *MO&O* freeze was adopted, we believe, under the circumstances presented, it would be appropriate to lift the freeze and revert to the *status quo ante* – *i.e.*, the application processing rules as they applied prior to the *MO&O*.

9. With respect to MDS, we will lift the freeze on applications for new stations and major modifications to existing stations by both site-based and BTA licensees. Since the Commission has awarded BTA licenses for MDS, we do not believe that a freeze is a necessary vehicle for preserving unassigned MDS spectrum.²⁵ We also note that there was no freeze on processing of MDS major modification applications prior to the *NPRM* and *MO&O*. By reverting to the *status quo ante*, we avoid disrupting ongoing business initiatives. Since both incumbent site-based and BTA licensees must comply with our existing interference rules, we do not believe allowing new facilities that comply with those rules should have a significant additional impact upon the MDS interference environment. We also note that the definition of a permissible minor change in MDS is very restrictive.²⁶ Moreover, based upon the record before us, it is most likely that the MDS operators filing applications during this interim period would be converting their systems to two-way operation. There is little indication that MDS operators want to construct any additional high-powered one-way systems (which could have a greater impact on the interference environment).²⁷ It is possible, of course, that even a two-way MDS system deployed during the interim period could run afoul of the rules we ultimately adopt to limit electrical interference between adjacent operators, but we believe that for such systems it would not be unduly burdensome to make any necessary subsequent adjustments. We warn applicants that any construction or other system deployments will be at the licensee's risk, and we anticipate that we will require such applicants to modify their systems to comply with any new technical rules that we adopt in this proceeding.

10. With respect to ITFS, we will not allow the filing of applications for new ITFS stations. This is consistent with the ITFS applications procedures that applied before we adopted the *MO&O*. WCA and the commenters who addressed this issue agree that it is appropriate to prohibit applicants from filing applications for unassigned ITFS spectrum during the pendency of the rulemaking.²⁸ Moreover, we continue to believe that allowing applications for new ITFS stations might limit the effectiveness of the decisions ultimately made in the context of this proceeding.²⁹ With respect to applications for unassigned ITFS spectrum, no party has challenged our conclusion that freezing such applications is consistent with the approach we have taken in other existing services where we have

²⁵ FCC Fact Sheet, *Auction 6 Multipoint/Multichannel Distribution Services*, accessible on the Commission's web site at <http://wireless.fcc.gov/auctions/06/factsheet.html>.

²⁶ See 47 C.F.R. § 21.41. Under Section 21.41, an MDS facility modification is deemed to be minor if the facilities to be modified are not located within thirty-five miles of the Canadian or Mexican borders; the modified facility would not produce a power flux density that exceeds -73 dBW/m² at locations on the boundaries of PSAs to which there is an unobstructed signal path; any increase in EIRP is one and one-half dB or less over the previously-authorized power value or the necessary bandwidth is not increased by more than 10 percent of the previously authorized necessary bandwidth; any increase in antenna height is less than three meters; and the geographical coordinates of a transmitter station will be less than ten seconds of latitude or longitude or both.

²⁷ See *NPRM*, 18 FCC Rcd at 6734-35 ¶ 24.

²⁸ WCA Petition at 3, Nucentrix Comments at 1-2.

²⁹ See *MO&O*, 18 FCC Rcd at 6813 ¶ 227.

proposed to adopt a new licensing approach.³⁰ Finally, we note that the Commission has not accepted applications for new ITFS stations since October 1995.³¹ Therefore, we believe that continuing the freeze on applications for new ITFS stations should not disrupt existing business plans. Accordingly, we affirm our decision to freeze applications for new ITFS stations.

11. We will allow the filing of major change applications by existing ITFS licensees, however. In 1999, when the Commission changed the Part 74 rules to allow major change ITFS applications to be filed at any time, it noted that ITFS major change applications might be necessary in order to allow ITFS licensees to provide two-way service.³² Moreover, since major change applications could be filed prior to the *MO&O*, lifting the freeze would restore the *status quo ante*. We emphasize that while ITFS licensees may file major change applications, their PSAs remain frozen.³³ Thus, any major change applications will not change the area within which licensees are entitled to interference protection.

12. We further emphasize that, while applicants may file during this interim period, any construction or other system deployments will be at the licensee's risk and may be subject to modification or removal when and if new rules are adopted. To the extent that such facilities are inconsistent with any new rules we adopt in this proceeding, it is very likely that we will require such applicants to modify their systems to comply with such new rules. We note that, unlike licensees who had constructed facilities prior to the release of the *MO&O*, applicants filing after this date will be on notice that the Commission is considering changes to the MDS and ITFS technical rules. Accordingly, we do not believe that such applicants and licensees of pre-existing facilities are similarly situated, and as a result, we ultimately may elect not to grant such applicants the same "grandfathering" rights as entities with pre-existing facilities.

IV. CONCLUSION AND ORDERING CLAUSES

13. We conclude that it would be in the public interest to modify the freeze established in the *MO&O* by eliminating it for MDS stations, and by allowing the filing of major change applications by ITFS licensees and permittees. Applications for new ITFS stations are still prohibited pending action in this proceeding.

³⁰ *Id.*, citing, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rule Making*, WT Docket No. 96-18, PP Docket No. 93-253, 11 FCC Rcd 3108 (1996) and Amendment of the Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Notice of Proposed Rule Making*, 12 FCC Rcd 7973 (1997).

³¹ In 1995, the Commission determined that it would accept ITFS applications for new facilities only during limited periods, referred to as "windows." Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 2907 ¶ 8 (1995). We announced filing windows in 1995 and 1996, but the 1996 window was for a limited purpose that did not include new stations. See Notice of Instructional Television Fixed Service Filing Window from October 16, 1995, through October 20, 1995, *Public Notice*, Report No. 23565A (rel. Aug. 4, 1995); Mass Media Bureau Announces Commencement of Sixty (60) Day Period for Filing ITFS Modifications and Amendments Seeking to Co-Locate Facilities with Wireless Cable Operations, *Public Notice*, 11 FCC Rcd 22422 (1996).

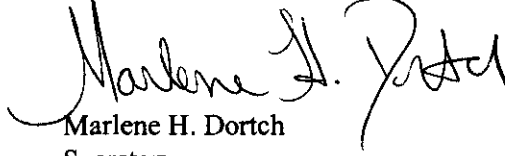
³² Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order on Reconsideration*, 14 FCC Rcd 12764, 12768-71 ¶¶ 7-15 (1999).

³³ 47 C.F.R. §§ 21.902(d)(2), 74.903(d).

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, 47 U.S.C. § 154(i), 303(r), and 405, and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, that the petitions for reconsideration filed by the Wireless Communications Association, International, Inc. and Plateau Communications, Inc. on April 8, 2003 ARE GRANTED to the extent indicated and are otherwise DENIED.

15. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, that effective upon the release date of this order, applications for new MDS stations, for major modifications to MDS stations, and for major changes to ITFS stations MAY BE FILED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A
LIST OF PLEADINGS

Petitions for Reconsideration

Plateau Telecommunications, Inc. (Plateau)
Wireless Communications Association International, Inc. (WCA)

Comments

Beamspeed, LLC (Beamspeed)
Centimeter Wave Television, Inc. (CWT)
David R. Hollowell (Hollowell)
Navini Networks, Inc. (Navini)
Nucentrix Broadband Networks, Inc. (Nucentrix)
Sioux Valley Wireless (Sioux Valley Wireless)
Sprint Corp. (Sprint)
Virginia Communications, Inc. (VCI)
Winbeam, Inc. (Winbeam)
Wireless World, LLC (Wireless World)
Zephyr Communications LLC (Zephyr)